

# Legal Reform in Japan at the Dawn of the 21st Century

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## I. Introduction

The Japanese legal system is undergoing “dramatic,”<sup>1</sup> “far-reaching,”<sup>2</sup> and “epoch-making”<sup>3</sup> reforms. These reforms were initiated by the Justice System Reform Council (JSRC), which was established by the Japanese Cabinet in July 1999.<sup>4</sup> Scholars have compared the current legal reforms to those of the late 19th and mid 20th centuries.<sup>5</sup> The JSRC has drawn the same parallels.<sup>6</sup>

This article examines, using recent legal scholarship and news sources, two reforms of the Japanese legal system recommended by the JSRC: (1) the process by which individuals become licensed attorneys in Japan and (2) the reintroduction of jury trials. The article analyzes the objectives, impact, and implications of the reforms. The paper concludes by noting the reforms’ achievements thus far and describing some of the challenges that lay ahead.

## II. *Bengoshi*

When the term “lawyer” or “attorney” is used in this paper, it refers to the legal professional known in Japan as “*bengoshi*.” “[T]he functions of a *bengoshi* are much more limited in scope than the ‘lawyer’ we think of in English. *Bengoshi* are primarily

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<sup>1</sup> Tom Ginsburg & Glenn Hoetker, *The Unreluctant Litigant? An Empirical Analysis of Japan’s Turn to Litigation*, 35 J. LEGAL STUD. 31, 32 (2006).

<sup>2</sup> Takao Suami & Charles D. Weisselberg, *Building Clinical Legal Education Programs in a Country without a Tradition of Graduate Professional Legal Education: Japan Educational Reform as a Case Study*, 13 CLINICAL L. REV. 417, 418 (2006).

<sup>3</sup> Kahei Rokumoto, *Law and Culture in Transition*, 49 AM. J. COMP. L. 545, 545 (2001).

<sup>4</sup> Recommendations of the Justice System Reform Council, available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html> (last visited Oct. 25, 2007) [hereinafter *JSRC Recommendations*].

<sup>5</sup> Ginsburg & Hoetker, *supra* note 1, at 36 (citing Rokumoto, *supra* note 3).

<sup>6</sup> See *JSRC Recommendations*.

litigators.”<sup>7</sup> *Bengoshi* are not the direct counterparts of American litigators, however; “many of the legal areas that are a routine part of litigation practices in the United States, such as personal injury, medical malpractice, and divorce and custody matters, are not normally part of a *bengoshi*’s practice in Japan.”<sup>8</sup> “[T]he practice of Japanese *bengoshi* is relatively pure, technically narrow legal work involving court-related disputes with a fair amount of money at stake. Medium-sized industrialists and those involved in a limited range of real estate transactions are the overwhelming beneficiaries of the services of *bengoshi*.”<sup>9</sup>

*Bengoshi* also differ from their American counterparts in number. In the United States, there are 1.14 million resident active attorneys<sup>10</sup> (meaning they have passed their resident state’s bar examination requirements) serving a population of 303 million people.<sup>11</sup> In other words, there is one attorney for every 266 residents. By contrast, in Japan there are 21,983 *bengoshi* serving a population of 127 million people.<sup>12</sup> In other words, there is one *bengoshi* for every 5,777 residents. This figure, however, does not include judges, prosecutors, or specialized legal professionals such as the 67,356 tax attorneys (*zeirishi*), 5,632 patent attorneys (*benrishi*), 17,606 judicial scriveners (*shiho shoshi*), and 37,729 administrative scriveners (*gyosei shoshi*) in Japan.<sup>13</sup> Combining the populations of *bengoshi* and the specialized legal professionals listed in the preceding sentence results in a sum of 150,306 legal professionals – about one legal professional for every 845 residents. Note that the specialized legal professionals listed above do

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<sup>7</sup> George Schuhmann, *Beyond Litigation: Legal Education Reform in Japan and What Japan’s New Lawyers Will Do*, 13 U. MIAMI INT’L & COMP. L. REV. 475, 503 (2006).

<sup>8</sup> *Id.*

<sup>9</sup> Michael K. Young, *Foreign Lawyers in Japan: A Case Study in Transnational Dispute Resolution and Marginal Reform*, 21 LAW IN JAPAN, 84, 102 (1988).

<sup>10</sup> American Bar Association, National Lawyer Population by State, [http://www.abanet.org/marketresearch/2007\\_Natl\\_Lawyer\\_FINALonepage.pdf](http://www.abanet.org/marketresearch/2007_Natl_Lawyer_FINALonepage.pdf) (last visited Oct. 22, 2007).

<sup>11</sup> U.S. and World Population Clocks, <http://www.census.gov/main/www/popclock.html> (last visited Oct. 22, 2007).

<sup>12</sup> Suami & Weisselberg, *supra* note 2, at 426.

<sup>13</sup> *See id.*; Japan Federation of Bar Associations, Japanese Attorney System, <http://www.nichibenren.or.jp/en/about/system.html> (statistics accurate as of Feb. 2004) (last visited Oct. 25, 2007).

not need to pass the National Bar Examination; passage of the examination is required only for those who wish to become judges, prosecutors, and *bengoshi*. Accordingly, the best comparison is the number of resident, active attorneys in the United States per capita to the number of *bengoshi* in Japan per capita.

As one final comparison, California has 157,667 lawyers<sup>14</sup> (a statistic that excludes judges, inactive lawyers, and attorneys who are no longer eligible to practice) and a general population of 36.5 million people,<sup>15</sup> resulting in a ratio of one lawyer for every 232 residents. Thus, according to the statistics, California has less than a third of the population of Japan but seven times more lawyers.

### III. The New Law Schools and the New Bar Exam

#### A. Introduction

In April 2004, as a result of the recommendations issued by the JSRC, sixty-eight graduate professional law schools opened across Japan, ending an era in which formal legal education rested solely with undergraduate law programs.<sup>16</sup> In 2006, the Ministry of Justice significantly increased the number of examinees allowed to pass the bar exam.<sup>17</sup> Until 1990, only 500 examinees were allowed to pass the exam each year.<sup>18</sup>

#### B. Background

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<sup>14</sup> State Bar of California, Member Demographics, <http://members.calbar.ca.gov/search/demographics.aspx> (last visited Oct. 22, 2007).

<sup>15</sup> U.S. Census Bureau, Population Finder, California, [http://factfinder.census.gov/servlet/SAFFPopulation?\\_event=Search&\\_state=04000US06](http://factfinder.census.gov/servlet/SAFFPopulation?_event=Search&_state=04000US06) (last visited Oct. 22, 2007).

<sup>16</sup> Most sources state that sixty-eight graduate law schools opened in April 2004 (*see e.g.*, Suami & Weisselberg, *supra* note 2, at 419; Katsumi Yoshida, *Legal Education Reforms in Japan: Background, Rationale, and the Goals to Be Achieved*, 24 Wis. Int'l L.J. 209, 216 (2006); Schuhmann, *supra* note 7, at 478); however, some sources state that sixty-eight graduate law schools opened in April 2004 (*see e.g.*, James A. Jolly, *Where are the Japanese Going with Their New Law Schools?*, 10-SEP HAW. B.J. 32, 32 (2006); *Number Allowed to Pass New Bar Exam Upped*, DAILY YOMIURI (Japan), Mar. 2, 2005, at 4, *available at* 2005 WLNR 3181023).

<sup>17</sup> Yoshida, *supra* note 16, at 211; *Number Allowed to Pass New Bar Exam Upped*, *supra*, note 17.

<sup>18</sup> Yoshida, *supra* note 16, at 210-11.

Before the establishment of graduate law schools in April 2004, the path to becoming a *bengoshi* typically consisted of (1) obtaining an undergraduate degree in law; (2) passing the National Bar Examination (which did not have a degree requirement<sup>19</sup>), passage of which was the sole prerequisite for admission to the Legal Training and Research Institute (Institute); and (3) attending the Institute, completion of which was the sole entryway to becoming a judge, prosecutor, or *bengoshi*.<sup>20</sup> (In this paper, the group of individuals who passed the National Bar Examination and completed apprenticeship training at the Institute will be called “licensed legal professionals.”)

Undergraduate programs in law were not designed to provide students with professional legal education and practical skills. Instead, the programs typically were characterized by curricula which consisted of courses on law, political science, and public administration. The programs produced generalists rather than professional practitioners.<sup>21</sup> While more than forty thousand people received undergraduate law degrees each year,<sup>22</sup> few would ever practice law and most entered the working world directly after graduation as government workers or white-collar office workers.<sup>23</sup>

“One of the most important facts about the traditional bar examination is that it was a competitive examination”<sup>24</sup> rather than a qualifying examination: Until 1990, successful passage of the examination was limited to 500 examinees. According to Professor Kahei Rokumoto of Hokkaido University School of Law, “It is whispered that the long-imposed ceiling

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<sup>19</sup> “[O]n occasion, widespread media attention has been placed on non-traditional persons passing the examination, such as housewives with no college education.” Sabrina Shizue McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 ASIAN-PACIFIC L. & POL’Y J. 121, 124 n.7 (2001).

<sup>20</sup> Suami & Weisselberg, *supra* note 2, at 424-25.

<sup>21</sup> Masako Kamiya, *Structural and Institutional Arrangements of Legal Education: Japan*, 24 WIS. INT’L L.J. 153, 154 (2006).

<sup>22</sup> *Id.* at 153-54.

<sup>23</sup> *Id.* at 154; Yoshida, *supra* note 16, at 210.

<sup>24</sup> Hisashi Aizawa, *Japanese Legal Education in Transition*, 24 WIS. INT’L L.J. 131, 144-45 (2006).

[of five hundred] corresponded to the capacity of the Institute . . . to handle the two-year training required for those who have passed the examination to become qualified as lawyers.”<sup>25</sup>

“Bar passage rates (and, hence, admission rates to the Institute) have been very low: approximately 2 to 3 per cent of the total number taking the exam throughout the 1980s and 1990s.”<sup>26</sup> By contrast, in the U.S. there is an average overall bar passage rate of 67 per cent and an average passage rate of 78 per cent for first-time test-takers.<sup>27</sup> The low passage rate of the National Bar Examination and the absence of bar exam preparation courses at the undergraduate law programs<sup>28</sup> led many to attend “cram schools,” “year-long programs devoted to memorization of the material likely to appear on the National Bar Examination.”<sup>29</sup> Cram school was no guarantee to passing the annually-administered exam on the first try: “More than five years of study – at cram schools, not universities – ha[d] been the norm to pass Japan’s extremely competitive bar exam.”<sup>30</sup> In 2005, the average age of the successful examinee was 29.03.<sup>31</sup> Since the primary means to the legal profession was years of rote memorization in cram schools, the JSRC acknowledged the “serious adverse impact on securing the quality of those who are to become legal professionals . . . .”<sup>32</sup>

Another consequence of the competitive bar exam was that few were entering, and thus graduating from, the Institute. “[A]rguments for increasing the number of lawyers were limited until recently. In the late 1990s, many parts of Japanese society, especially the big business

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<sup>25</sup> Rokumoto, *supra* note 3, at 533.

<sup>26</sup> Suami & Weisselberg, *supra* note 2, at 426.

<sup>27</sup> 2006 Statistics, THE BAR EXAMINER 17 (May 2007), available at [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2006stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2006stats.pdf) (last visited Oct. 25, 2007) (In the United States there is no national bar examination and each state administers its own bar examination.).

<sup>28</sup> Yoshida, *supra* note 16, at 211.

<sup>29</sup> Suami & Weisselberg, *supra* note 2, at 427-28.

<sup>30</sup> Eriko Arita, *U.S.-Style Law Schools to Offer Practical Approach*, JAPAN TIMES, July 2, 2003); accord Aizawa, *supra* note 24, at 145.

<sup>31</sup> *Id.*

<sup>32</sup> JSRC Recommendations, *supra* note 4, at ch. III, pt. 2.

circles joined by the ruling Liberal Democratic Party, began to complain about the problems of the Japanese justice system.”<sup>33</sup> The complaints stemmed from factors that materialized in the early 1990s: the deflation of Japan’s “bubble economy,” increasing globalization and global competition, and corruption scandals among bureaucrats.<sup>34</sup> The factors triggered a movement towards a more-market oriented society with less government regulation, increased international business transactions, and a shift in power from the bureaucracy to the legal system.<sup>35</sup>

### C. The Recommendations of the Justice System Reform Council

In response to the aforementioned complaints and changes, the Cabinet formed the Justice System Reform Council in July 1999. It was chaired by Koji Sato, a law professor, and its thirteen members included *bengoshi*, university administrators, business executives, and the secretary general of the Japan Housewives Association.<sup>36</sup> The JSRC delivered its final recommendations in June 2001.<sup>37</sup> Its primary goals were to “clarify[] the role to be played by justice in Japanese society in the 21st century,” to assist “participation by the people in the justice system” and to realize “a legal profession as it should be.”<sup>38</sup>

Japan . . . has been working on various reforms, including political reform, administrative reform, promotion of decentralization, and reforms of the economic structure such as deregulation. What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject, with autonomy and bearing social responsibility.<sup>39</sup>

In order to attain the JSRC’s goals, the JSRC recommended increasing the number of legal professionals and creating law schools that, “while centered on legal theory . . . , introduce practical education.”<sup>40</sup> The JSRC also recommended increasing the number of people who

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<sup>33</sup> Aizawa, *supra* note 24, at 133-34.

<sup>34</sup> See Schuhmann, *supra* note 7, at 485-88.

<sup>35</sup> *Id.* at 488;

<sup>36</sup> Annie Murphy Paul, *Land of the Rising Lawyer*, 2005-AUG LEGAL AFF. 64, 65 (2005).

<sup>37</sup> *JSRC Recommendations*, *supra* note 4, “Introduction.”

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at ch. I.

<sup>40</sup> *Id.* at ch I., pt. 2-2.

passed the bar exam to three thousand per year by 2010. In addition, the JSRC intended to increase the availability of lawyers in rural areas. “Lawyers are unequally distributed around Japan, with most concentrated in urban centers and some prefectures having only a handful of attorneys.”<sup>41</sup>

The new professional schools recommended by the JSRC would “build[] a bridge between theoretical education and practical education” and “[e]nable law students to acquire the specialized qualities and capacity required for legal professionals who take direct responsibility for the ‘rule of law.’”<sup>42</sup> While the prior legal training system most resembled the German legal training system, the new law schools were specifically patterned after American law schools.<sup>43</sup> The new schools are to provide “bi-directional (with give-and-take between teachers and students) and multidirectional (with interaction among students) educational programs rich in content,” in contrast to the former undergraduate law programs, which taught students using “one-way lectures.”<sup>44</sup> (Graduate programs in law did exist prior to the JSRC recommendations, but were designed to specifically train academic researchers and professors.<sup>45</sup>)

#### D. Present Results of the Recommendations

##### 1. The Law Schools

As a result of the JSRC recommendations, in April 2004, sixty-eight graduate professional law schools opened, shifting formal legal education from undergraduate law programs to graduate professional law schools.<sup>46</sup> The new schools began in April 2004 with 5,767 students.<sup>47</sup> Six more universities later applied and were accredited; these graduate law

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<sup>41</sup> Ginsburg & Hoetker, *supra* note 1, at 38.

<sup>42</sup> *JSRC Recommendations*, *supra* note 4, at ch. I, pt. 2-2.

<sup>43</sup> Yoshida, *supra* note 16, at 215-16.

<sup>44</sup> *JSRC Recommendations*, *supra* note 4, at ch. I, pt. 2-2(2).

<sup>45</sup> Aizawa, *supra* note 24, at 137.

<sup>46</sup> See Ginsburg & Hoetker, *supra* note 1.

<sup>47</sup> Aizawa, *supra* note 24, at 135.

schools started in April 2005.<sup>48</sup> Total enrollment in April 2005 among the seventy-four law schools, however, went down to 5,544 students.<sup>49</sup>

Graduation from the graduate law schools confers the equivalent of the Juris Doctor (J.D.) degree.<sup>50</sup> “Undergraduate law programs continue to operate, but they have changed, or will be obliged to change and adjust under the new system.”<sup>51</sup> Moreover, they no longer serve as a direct path to a legal qualification.

## 2. The Bar Exam

On May 19, 2006, the first graduates of the new law schools took the new bar exam for the first time. Of the 2,091 graduates who took the new exam, 1,009 passed – about 48 per cent.<sup>52</sup> This group of examinees graduated from the new law schools after only two years of study, due to their prior education at the undergraduate level.<sup>53</sup> The first class to graduate from the new law schools after three full years of graduate law school study did so in May 2007.<sup>54</sup> Unfortunately, the May 2007 administration of the National Bar Examination was permeated by scandal.

In May 2007, 4,607 examinees sat for the bar exam and 1,851 passed – a passage rate of 40.18 per cent.<sup>55</sup> The performance of graduates from Keio University Law School was called into question, however, due to allegations that Eiji Uemura, one of the law school’s professors at the time and a member of the committee that set and graded the May 2007 bar exam, gave hints

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<sup>48</sup> *Id.* at 136.

<sup>49</sup> *Id.*

<sup>50</sup> Kamiya, *supra* note 21, at 156.

<sup>51</sup> Yoshida, *supra* note 16, at 216.

<sup>52</sup> Suami & Weisselberg, *supra* note 2, at 434.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *1,850 Pass New Bar Exam*, DAILY YOMIURI (Japan), Sept. 15, 2007, at 3, available at 2007 WLNR 18019273.



on the content of the examination to his students.<sup>56</sup> He resigned from Keio University Law School in August.<sup>57</sup>

In response, in September 2007 “[t]he Justice Ministry’s committee on the National Bar Examination said . . . it would cut by half the number of graduate school professors who are also responsible for formulating questions for the bar exam.”<sup>58</sup> In addition, the committee “also will prohibit professors appointed to set questions from teaching final-year students, or those who have already graduated from law school, starting from the 2009 exam.”<sup>59</sup>

### 3. The Legal Training and Research Institute

By 1999, before the graduate professional schools had even opened, the period of apprenticeship training required at the Institute had been reduced from two years to 18 months.<sup>60</sup> In 2000, the Institute graduated 1,000 individuals,<sup>61</sup> a two-fold increase over the 500 individuals who had graduated in each prior year.

### 4. Number and Distribution of *Bengoshi*

The JSRC sought to increase the number and geographical coverage of *bengoshi*, especially in traditionally underserved rural areas. Unfortunately, the increase in *bengoshi* has not been uniform.<sup>62</sup> [ . . . ] As of 2002, “[m]ost of the increase in the number of lawyers occurred in the urban prefectures, where lawyers had been previously concentrated. Urban prefectures uniformly added above-average percentages of lawyers . . . .”<sup>63</sup>

### 5. Clinical Legal Education

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Ginsburg & Hoetker, *supra* note 1, at 38.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

The new law schools have bridged theory and practice with some success. Many of the new law schools have added practicing *bengoshi* to their faculty.<sup>64</sup> These faculty-practitioners have a key role in the new schools' clinical programs.

Formal legal education at the undergraduate level consisted entirely of "one-way lectures."<sup>65</sup> Students in clinical programs, however, "learn by doing."<sup>66</sup> Waseda Law School has developed the most extensive clinical legal education program to date.<sup>67</sup> The depth and breadth of Waseda's clinics may be attributed to the due diligence of its faculty. In 2002, faculty from Waseda Law School visited law schools in the United States and Canada to observe clinical legal education.<sup>68</sup> In the fall of 2003, Waseda Law School debuted pilot clinical programs.<sup>69</sup> In the spring of 2006, the school began to offer clinical courses for credit.<sup>70</sup>

In Waseda Law School's Civil Law Clinic, students work directly with clients under the supervision of faculty-practitioners and non-practicing professors. Students interview clients, conduct legal research, discuss the clients' legal issues with faculty supervisors, and then explain the legal options to the clients. One of the supervising faculty-practitioners reported that clients sent him seven thank-you letters – "the only thank-you letters he ha[d] received in twenty-one years as an attorney!"<sup>71</sup>

Waseda Law School's Criminal Justice Clinic is headed by two faculty-practitioners "who have roughly twenty years of criminal defense experience."<sup>72</sup> Students attend confidential interviews at police stations with their faculty supervisors. Students also work on pretrial

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<sup>64</sup> Suami & Weisselberg, *supra* note 2, at 456.

<sup>65</sup> *JSRC Recommendations*, *supra* note 4, at ch. III, pt. 2.

<sup>66</sup> Suami & Weisselberg, *supra* note 2, at 438-39.

<sup>67</sup> *Id.* at 438.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 439.

<sup>72</sup> *Id.* at 440.

motions and dismissal motions. “The results for the clients have been remarkable,” according to an article co-authored by a professor at Waseda Law School and a professor at Washington University School of Law:

In two of the nine cases taken at the pretrial level, the judge dismissed the prosecutors' warrant requests. This is a dismissal rate of 22 per cent, which is over seventy-three times greater than the average dismissal rate of approximately 0.3 per cent. Even though the sample is very small, the clinic students and faculty are providing legal representation that is equal to or exceeds the representation of the most respected criminal defense attorneys in Tokyo.<sup>73</sup>

As of 2006, fifty-two of the seventy-four new law schools claim to offer clinical courses.<sup>74</sup> The types of clinics, the level of student involvement, and the method of clinical teaching vary from school to school; however, the early results have been promising.<sup>75</sup> The success of the clinical programs depends on the success of the new graduate professional law schools. Already there are concerns that the graduate professional law schools may replicate the “cram school” experience, a possible result given that bar exam passage rates have been lower than those recommended by the JSRC.<sup>76</sup> “It was taken for granted that a bar exam would be maintained with a few modifications, even though the limitation on the number of successful candidates was the source of the problems of traditional legal education.”<sup>77</sup> Clinical programs face challenges in securing funding, obtaining wider support from academics and practitioners, and providing students with course credit.<sup>78</sup>

Nonetheless, some of the results of the new law schools have been promising and even poignant – recall the faculty-practitioner who, after twenty-one years of practice, received his first thank-you notes from clients during his role as the supervising attorney of a clinic. Students

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 445.

<sup>75</sup> *See generally id.* at 438-53.

<sup>76</sup> *Id.* at 452, 457.

<sup>77</sup> Aizawa, *supra* note 24, at 150.

<sup>78</sup> *Id.* at 457.

in the new law schools are “enthusiastic and have a concrete sense of purpose.”<sup>79</sup> A more thorough and critical reform of the highly competitive National Bar Examination will (1) restore or improve the perceived impartiality of the exam and (2) aid the actualization of the legal profession envisioned by the Justice System Reform Council.

#### IV. Jury Trials

##### A. Introduction

In 2004, as result of the JSRC recommendations, the Japanese Diet passed legislation that will reintroduce jury trials in 2009, which were suspended in Japan in 1943.<sup>80</sup> The legislation provides that for major felony cases, juries consisting of six citizens and three judges will be impaneled, and for major felony cases in which the defendant admits guilt and all the parties so consent, four citizens and one judge will be impaneled.<sup>81</sup> The objectives of this reform are to allow “opportunities for the people to be involved in the administration of justice” and to establish a check on the power of the judiciary.<sup>82</sup> Although a jury system would further JSRC’s overall goal “that each and every person [would] . . . become a governing subject, with autonomy and bearing social responsibility,” scholars and observers hope that the presence and participation of juries will mitigate two problems of the judiciary: Judges, generally speaking, (1) are a homogeneous group, isolated from the rest of society, with narrow life/work experience, and (2) may suffer from prosecution bias.

##### B. Homogeneity, Insularity, and Limited Experience

Scholars have noted that, categorically speaking, judges are a homogenous, isolated, and elite group. “Judges in Japanese courts were all children of the same type of high-income

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<sup>79</sup> Aizawa, *supra* note 24, at 151, n.114.

<sup>80</sup> Andrew Henderson, *Jury Reform in Japan*, 53-JUN FED. LAW. 58, 59 (2006); Robert M. Bloom, *Jury Trials in Japan*, 28 LOY. L.A. INT’L & COMP. L. REV. 35, 36-37 (2006).

<sup>81</sup> Bloom, *supra* note 80, at 41.

<sup>82</sup> *JSRC Recommendations*, *supra* note 4, ch. IV., pt. 1.

parents, . . . graduated from the same universities . . . and, without ever experiencing any other profession, spend most of their lives in court with colleagues who all share the same mode of thinking.”<sup>83</sup> Not only do judges tend to share the same elite upbringing, “judges and prosecutors have long had high social status in Japan.”<sup>84</sup> In addition, most judges begin their judgeships immediately upon graduation from the Legal Training and Research Institute and stay on the bench for the rest of their careers;<sup>85</sup> as a result, most judges have no work experience outside of the judiciary.

The narrow educational background and work experience of most judges has been an issue. For example, the business community views most judges, “who lack business education or work experience, as incapable of understanding contemporary business and professional practices.”<sup>86</sup> As a result, the judiciary serves a public with which it has little in common.

Jurors will bring their diverse life experiences to the courtroom. The presence and participation of jurors will make judges more accessible to, and aware of, the public which they serve. Juries will help alleviate the elitism and insularity of judges. “The American jury was similarly intended to keep ‘class instincts of the judge in check.’”<sup>87</sup>

### C. Possible Prosecution Bias

In Japan, the conviction rate in criminal cases is 99.9 per cent,<sup>88</sup> compared to 90 per cent in United States District Courts.<sup>89</sup> One explanation for the high conviction rate is that

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<sup>83</sup> Colin P.A. Jones, *Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL’Y J. 363, 363 (2006) (quoting TAKASHI MARUTA, SAIBAN’IN SEIDO [The Lay Judge System], 43 (2004)).

<sup>84</sup> Suami & Weisselberg, *supra* note 2, at 424.

<sup>85</sup> Schuhmann, *supra* note 7, at 513.

<sup>86</sup> *Id.* (citing Carl F. Goodman, *The Somewhat Less-Reluctant Litigant: Japan's Changing View Toward Litigation*, 32 LAW & POL’Y INT’L BUS. 769, 806 (2001)).

<sup>87</sup> Bloom, *supra* note 80, at 49 (quoting Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 696 (1973)).

<sup>88</sup> See Bloom, *supra* note 80, at 47.

<sup>89</sup> U.S. Dep’t of Justice, Bureau of Justice Statistics, Federal Justice Statistics, [www.ojp.usdoj.gov/bjs/fed.htm](http://www.ojp.usdoj.gov/bjs/fed.htm) (last visited Oct 25, 2007).

prosecutors only bring cases that they believe they will win.<sup>90</sup> Another explanation is that judges consistently find in favor of the prosecution out of self-interest, since assignments to higher-level courts and specific geographical locations are controlled by the Supreme Court – and the individual justices that compose the Supreme Court are appointed by the Cabinet.<sup>91</sup> Thus, it is possible that the ruling party in the Cabinet exerts some influence over judges, causing judges to rule in favor of the ruling party by ruling in favor of the prosecution, as a means to curry the favor necessary for assignments to higher courts or different locations.<sup>92</sup>

The high conviction rate is one of the issues examined in *I Just Didn't Do It*, a film that opened in Japan in January 2007.<sup>93</sup> The film documents the legal battle of a man accused of groping a woman on a commuter train in Tokyo.<sup>94</sup> Director Masayuki Suo, who also directed *Shall We Dance?*, “says groping . . . is the type of accusation open to abuse because prosecutors can press charges without establishing a motive, except that a suspect is a male.”<sup>95</sup> According to Suo, “Police take advantage of suspects’ fear of public shame and urge them to sign confessions.”

The 99.9 per cent conviction rate was highlighted in a series of highly controversial acquittals in the 1980s. Between 1948 and 1955, four men were convicted of murder.<sup>96</sup> They subsequently spent most of their adult lives on death row before being acquitted and released after collectively spending over 130 years in confinement.<sup>97</sup> “The publicity associated with these

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<sup>90</sup> Bloom, *supra* note 80, at 47, n.107.

<sup>91</sup> *Id.* at 48.

<sup>92</sup> *Id.* at 48, n.113.

<sup>93</sup> *Director of 'Shall We Dance?' Challenges Japan's Justice System*, Pittsburgh Trib. Rev., Feb. 5, 2007, available at 2007 WLNR 2207029.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> Daniel H. Foote, *From Japan's Death Row to Freedom*, 1 PAC. RIM L. & POL'Y J. 11, 13 (1992).

<sup>97</sup> *Id.* at 13.

cases reflected especially adversely on the judiciary”<sup>98</sup> and led to numerous calls for judicial reform, including proposals for the adoption of a jury system.<sup>99</sup>

#### D. Mixed-Jury Trials

As mentioned earlier, one characteristic that makes the new Japanese jury system different from the American jury system is that the Japanese juries will be mixed juries, composed of citizens and judges. These mixed juries will be impaneled only for crimes that are punishable by death, life imprisonment, or imprisonment for at least a year where the crime involved an intentional act that caused the death of the victim.<sup>100</sup> In cases in which guilt is contested, the jury will consist of six citizens and three judges.<sup>101</sup> In cases in which “key facts are not at issue (e.g., where the defendant has confessed, and only sentencing remains),” the jury will consist of four citizens and one judge.<sup>102</sup> Jurors must be at least 20 years old, the age of majority in Japan.

In the new jury system, convictions will be decided by a simple majority vote provided that one citizen-juror (*saiban-in*) and one judge-juror agree. Professor Takashi Maruta, a law professor who authored a book on the new jury system, predicts that the judge-jurors will tend to vote as a bloc, with the result that, in either of jury configurations, all that will be needed for a jury verdict in accord with the judge-jurors’ bloc decision is two supporting *saiban-in* votes.<sup>103</sup> In support of this argument, Professor Maruta cites the statistic that for the 15-member Supreme Court of Japan, approximately 95% of its issued opinions in recent decades were unanimous.<sup>104</sup>

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<sup>98</sup> Bloom, *supra* note 80, at 47.

<sup>99</sup> Foote, *supra* note 96, at 13.

<sup>100</sup> Bloom, *supra* note 80, at 41.

<sup>101</sup> *Id.*

<sup>102</sup> Jones, *supra* note 83, at 366

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 366, n.18.

Another potential issue with the new jury system may be jurors' fear of retribution for convicting a criminal. For example, "there have been instances of judges themselves asking to be anonymous" in trials involving organized crime. If even judges fear retributive consequences, it is highly likely that prospective jurors will, too.

A third potential problem with the new jury system may be Japanese societal values. Japanese give great deference to those of higher social status "as reflected in an individual's wealth, profession, and position."<sup>105</sup> Moreover, Japanese have a high level of respect for authority figures.<sup>106</sup> Thus, there are concerns that *saiban-in* would defer to the conclusions of judge-jurors, who by the nature of their profession carry high social status and authority. Another factor that may influence jurors' decisions: In Japanese culture, maintaining good relationships is more important than asserting one's own ideas.<sup>107</sup> There is a Japanese proverb that illustrates this cultural value: "The nail that sticks up gets pounded down."<sup>108</sup> As a result, it may be the case that a *saiban-in* would render his or her decision based on the opinions of fellow jurors – especially the opinions of judge-jurors, which carry the weight of judicial authority – so as to not be "the nail that sticks up."

Nonetheless, "[t]he Japanese commitment to introducing a mixed-jury system is an important first step to increasing citizen participation in the judicial process."<sup>109</sup> The mixed-jury system will allow judges (who are, as previously mentioned, an elite, homogeneous, and insular group) and ordinary citizens to interact, and interact as equals since the JSRC intends that "[i]n the deliberations, *saiban-in* should possess generally equivalent authority to that of judges; and in the hearing process, *saiban-in* should possess appropriate authority including the authority to

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<sup>105</sup> Henderson, *supra* note 80, at 60.

<sup>106</sup> Bloom, *supra* note 80, at 56.

<sup>107</sup> Henderson, *supra* note 80, at 60.

<sup>108</sup> Bloom, *supra* note 80, at 56.

<sup>109</sup> *Id.* at 68.



question witnesses.”<sup>110</sup> Film director Masayuki Suo views the reintroduction of jury trials as “a tremendous opportunity for a change.”<sup>111</sup>

## V. Conclusion

Given the breadth and depth of these reforms, it is not surprising that criticism has arisen concerning the results and side effects of the reforms. But the same breadth and depth reflect the laudable goals of the JSRC – goals that are aimed at transforming the very consciousness of the Japanese people: “What commonly underlies these reforms is the will that each and every person will break out of the consciousness of being a governed object and will become a governing subject.”<sup>112</sup> Any reformation with such a purpose will by its nature be “dramatic,”<sup>113</sup> “far-reaching,”<sup>114</sup> and “epoch-making.”<sup>115</sup>

The legal reforms underway in Japan are, according to law professor Kahei Rokumoto, “ambitiously comprehensive.”<sup>116</sup> “This is good,” he writes, “for here is a great historical opportunity.”<sup>117</sup>

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<sup>110</sup> *JSRC Recommendations*, *supra* note 4, at ch. IV, pt. 1-1.

<sup>111</sup> *Director of 'Shall We Dance?' Challenges Japan's Justice System*, *supra* note 93.

<sup>112</sup> *JSRC Recommendations*, *supra* note 4, at ch. I.

<sup>113</sup> Ginsburg & Hoetker, *supra* note 1, at 32.

<sup>114</sup> Suami & Weisselberg, *supra*, note 2, at 418.

<sup>115</sup> Rokumoto, *supra* note 3, at 545.

<sup>116</sup> *Id.* at 558.

<sup>117</sup> *Id.*